IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 32.

In the Matter
of the
Petition of KABUSHIKI KAISHA KAWASAKI ZOSENJO, Owner, and KAWASAKI KISEN KABUSHIKI KAISHA, Bareboat Charterer of the steamship "VENICE MARU", for Exoneration from and Limitation of Liability.

CONSUMERS IMPORT CO., INC., *et al.*,
Cargo Claimants-Petitioners,

vs.

KABUSHIKI KAISHA KAWASAKI ZOSENJO and KAWASAKI KISEN KABUSHIKI KAISHA,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF PETITIONERS.

D. ROGER ENGLAR,
T. CATESBY JONES,
EZRA G. BENEDICT FOX,
THOMAS H. MIDDLETON,
Proctors for Petitioners.

September 25, 1943.

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Statement.

The Consumers Import Co., Inc., and other cargo owners, petitioned this Court for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit against two respondents: (1) Kabushiki Kaisha Kawasaki Zosenjo; and (2) Kawasaki Kisen Kabushiki Kaisha; and presented five questions for consideration by this Court. On May 10, 1943, this Court

entered an order granting certiorari pursuant to the prayer of the petition, but limited the argument to the fifth question presented, which is as follows: "Does the Fire Statute extinguish maritime liens for cargo damage or is its operation confined to *in personam* liability only?" In obedience to the order of the Court, this brief is confined to the fifth question submitted.

The opinion of the Circuit Court of Appeals for the Second Circuit is printed at pages 60-69 of the Record and is reported in 133 F. (2d) 781. The opinion of the District Court (Southern District of New York—Bondy, *J.*) is printed at pages 33-40 of the Record and is reported in 39 Fed. Supp. 349. The District Court's Findings of Fact and Conclusions of Law appear at pages 40-50 of the Record. The District Court decree, which the Circuit Court of Appeals affirmed (R. 69), is printed at pages 50-55 of the Record.

Jurisdiction.

The jurisdiction of this Court over this case is based on Section 240 of the Judicial Code (28 U. S. Code, Sec. 347) and Article III, Section 2, of the Constitution of the United States.

The Matter Involved.

Your petitioners (cargo-claimants-appellants in the Court below) are the owners or holders for value of bills of lading covering several hundred shipments of merchandise which were destroyed or seriously damaged by a fire—or by the means used to extinguish the fire,—which occurred on August 6, 1934, on board the Japanese steamship "Venice Maru", a general ship and common carrier, while on a voyage from Japan to United States Atlantic Coast ports via Los Angeles and the Panama Canal.

Respondent Kabushiki Kaisha Kawasaki Zosenjo, the owner, (herein called Kawasaki Zosenjo), is the drydock company which built the "Venice Maru" and thereafter let her under a bareboat form of charter to the other respondent, Kawasaki Kisen Kabushiki Kaisha (herein called the "K" Line or the Carrier). At all material times the "K" Line, pursuant to the bareboat form of charter (Ex. 17, R. 31-3) from Kawasaki Zosenjo, was in possession of the "Venice Maru", appointed and paid her master and crew, and operated her as a common carrier (Finding 2, R. 40).

The bills of lading here sued upon named on their face the "Venice Maru", "commanded by T. Inouye for the present voyage", as the carrying vessel and, after referring to the exceptions and conditions set forth on the reverse side, conclude with the clause: "IN WITNESS WHEREOF, the owners or Agents of the said vessel have signed * * *" (Ex. 9, R. 30 A). The owner of the "Venice Maru" (Kawasaki Zosenjo) concededly "had nothing whatsoever to do with the * * * operation or control of the ship" (Finding 1, R. 40); the bills of lading were all in fact signed by the bareboat charterer (the "K" Line) or at outports by its duly authorized agents (Finding 3, R. 40-41). More important, however, is the fact that immediately after the signature on the bills of lading appears the phrase: "For Master" (Ex. 9, R. 30 A). The breach of such contracts gave the petitioners a maritime lien against the "Venice Maru" and a right of action *in rem* against her (see pp. 16-17, *infra*). In signing the bills of lading, the master did not act as agent for the owner, nor did the carrier so act. It was the other way about, for, even at the home port, the "K" Line executed them "For Master". Such contracts are ship contracts, not owner's contracts. Indeed, it is well settled that the master's authority to bind the ship to such a contract is not derived from the owner or carrier, but is created by the Maritime law, by virtue of the master's position as master. See cases cited at pages 24-25, *infra*.

Your petitioners filed libels *in rem* against the "Venice Maru" for the breach of these contracts of carriage (R. 5). Thereafter the two respondents (referred to as petitioners in the District Court), on November 16, 1934, secured an *ex parte* order (R. 12-14) enjoining the prosecution of these libels against the vessel, by instituting a proceeding in Admiralty in the United States District Court for the Southern District of New York, wherein they prayed for exemption from or the limitation of liability in respect of claims for such loss and damage to cargo under the provisions of the Act of March 3, 1851 (now 46 U. S. Code, Sec. 182-186, formerly R. S., Sec. 4282-86) (R. 1-8). Kawasaki Zosenjo's sole connection with the case is that of a petitioner which joined with the "K" Line in seeking an injunction against the prosecution of the suits *in rem* against the steamship "Venice Maru". In lieu of surrendering the "Venice Maru" to a trustee, as is provided for in Section 4 of that Act (now 46 U. S. Code, Sec. 185), the respondents exercised the option afforded under this Court's Admiralty Rule LI and filed an *ad interim* stipulation (R. 9-11) with surety who undertook thereby that the petitioners (respondents here) would pay into Court at the proper time "the amount or value of the petitioners' interest in said vessel and her pending freight, if any" (R. 10) and that, in the interim, "this stipulation shall stand as security for all claims in said limitation proceedings" (R. 10).

Such a stipulation in admiralty stands as a substitute for the ship and the matter is thereafter dealt with as "if the thing itself were still in (the Court's) custody". *The Palmyra*, 12 Wheat. 1, at p. 9. See also, among others, *U. S. v. Ames*, 99 U. S. 35. So also in *Hartford Accident Co. v. So. Pac. Co.*, 273 U. S. 207, in discussing the nature of a limitation proceeding such as this is, this Court said at p. 217:

> "The jurisdiction of the admiralty court attaches *in rem* and *in personam* by reason of the custody of

the *res* put by the petitioner into its hands" (p. 217 of 273 U. S.).

See also *The City of Norwich*, 118 U. S. 468, at p. 502.

Therefore, the case is here as a suit *in rem*, and neither Kawasaki Zosenjo nor the "K" Line need be considered except in so far as they have injected themselves into the proceedings by filing the petition and stipulation aforesaid. In short, the liability which Kawasaki Zosenjo, the owner of the "Venice Maru", sought to defend below and seeks to defend here, is that of the steamship "Venice Maru" *in rem* and not any liability of its own arising from the contracts of affreightment. Admittedly, Kawasaki Zosenjo did not execute any of the bills of lading; they were all signed either by the "K" Line or by its duly authorized agents (Finding 3, R. 40-41), "for Master" (R. 30 A). Thus, the only liability of the Kawasaki Zosenjo present in this case is the liability voluntarily assumed by it when it saw fit to join itself with the "K" Line as a petitioner in instituting these limitation proceedings, *i. e.*, its liability, as owner of the "Venice Maru", to pay into Court on order the value of that vessel. *The Paraiso*, 226 Fed. 966. See also *The City of Norwich*, 118 U. S. 468 at p. 502.

The damage to the cargo is conceded (R. 5). The defense asserted by respondents is that the vessel is not liable because of the provisions of the so-called Fire Statute (see Appendix A, p. 43), now 46 U. S. Code Sec. 182 (formerly R. S. Sec. 4282), which is derived from the Act of Congress of March 3, 1851, c. 43, Sec. 1, 9 Stat. 635, as amended. That provision of the Act of March 3, 1851, as carried over into the U. S. Code (Sec. 182 of Title 46), provides that "no owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel", etc. It contains

no reference to liability as a result of a master's contract, although the other provision of the same Act relating to liability for valuables does contain such a provision (Section 2 of the Act of March 3, 1851; now 46 U. S. Code Sec. 181; Appendix A at p. 43). Nor does it contain any reference to the *in rem* liability of the vessel.

The District Court made elaborate findings of fact (R. 40-47), which were adopted by the Circuit Court of Appeals (R. 68-9). For the present argument it is sufficient to call the Court's attention to the following:

> "The stowage of the 665.6 tons of sardine meal in No. 1 lower hold, as described in findings (18) and (27), was a proximate cause of the fire in that, even assuming that rice ventilators were used in the manner claimed by the 'K' Line, insufficient ventilation was provided" (Finding 28, R. 44-5);

> "The stowage of the sardine meal on the 'Venice Maru' was negligent and made the vessel unseaworthy" (Finding 49, R. 47);

> " 'Due diligence' to make the vessel seaworthy was not exercised by Captain Fegen in stowing the sardine meal in No. 1 lower hold of the 'Venice Maru' " (Finding 50, R. 47).

In view of the foregoing findings and particularly because the bill of lading was, by clause 26 thereof (Ex. 9. R. 30 B), specifically subject to the Harter Act (Act of February 13, 1893—46 U. S. Code Secs. 190-196; Appendix B), which renders invalid any contract provisions exempting against negligent stowage or avoiding the obligation to exercise due diligence to make the ship seaworthy, it is clear that the bill of lading exceptions afford no basis for exoneration, but that the only possible defense to claims for cargo damage so caused rests on the statutory exemption afforded by the Fire Statute (now 46 U. S. Code, Sec. 182), which merely provides that "no

owner of any vessel shall be liable" for damage to cargo on board the vessel by fire "unless such fire is caused by the design or neglect of such owner". (For full text of the Statute see Appendix A.)

The Circuit Court of Appeals below in holding that the Fire Statute exonerated the vessel went beyond the words of the statute. It held that since the fire had occurred "without the design or neglect" of either the owner or the bareboat charterer of the "Venice Maru" personally, the Fire Statute (46 U. S. Code, Sec. 182) exonerated the ship *in rem* as well as the carrier *in personam* from all liability (R. 63-64).* It specifically refused (R. 63) to follow the ruling in *The Etna Maru*, 33 F. (2d) 232, certiorari denied 280 U. S. 603.** There the Circuit Court of Appeals for the Fifth Circuit had held that the Fire Statute (Sec. 1 of the Act of March 3, 1851; now 46 U. S. Code, Sec. 182) was to be construed in *pari materia* with the other provisions of the Act of March 3, 1851, which leave the shipowner "liable to the extent of his ship and freight for the negligence and misconduct of his employees" (p. 234 of 33 F. (2d)) and that (pp. 234-5 of 33 F. (2d)) "there is nothing in the statute to bar a re-

* The District Court in its opinion (R. 33-40) did not discuss this question; but its decree, which the Circuit Court of Appeals affirmed (R. 69), perpetually enjoined "all persons or corporations, having or claiming to have sustained any loss, damage, destruction or injury by reason of or in connection with the fire referred to in the petition * * * from instituting or prosecuting * * * any claim, action, suit or proceeding whatsoever * * * against the steamship 'Venice Maru' her engines, etc. * * *" (R. 54).

** The Circuit Court felt that the decision of this Court in *Earle & Stoddart* v. *Wilson Line*, 287 U. S. 420, has deprived *The Etna Maru* of much of its authority. The *Earle & Stoddart* case involved only the carrier's liability *in personam* and did not in any way touch upon the question of the effect of the Fire Statute upon the vessel's *in rem* liability. Since this question was raised by respondent in its brief in opposition to the petition for a writ of certiorari and the writ was, nevertheless, granted, we take it that the court agrees that the *Earle & Stoddart* case did not dispose of this question.

covery against the ship", *i. e.* nothing to affect the ship's *in rem* liability in respect of damage sustained after the goods had been loaded on board as distinguished from the carrier's separate *in personam* liability. This case is here to resolve this conflict between the two circuits.

The Statutes Involved.

As pointed out by Judge Foster in *The Etna Maru*, 33 F. (2d) 232, at p. 234:

> "Prior to 1851, under the common law, the liability of the shipowner for damages to freight caused by a fire on board ship was that of an insurer, and absolute, unless the fire was caused by an act of God or the public enemy, his personal liability was limited only by the amount of the loss and his ability to respond. *New Jersey Steam Navigation Co.* v. *Merchants' Bank*, 6 How. 344, 12 L. Ed. 465; *The Main* v. *Williams*, 152 U. S. 122, 14 S. Ct. 486, 38 L. Ed. 381."

The decision of this Court in *N. J. Steam Navig. Co.* v. *Merchants' Bank*, 6 How. 344, an action *in personam* based upon a ~~common law liability~~, led* to the passage of the Act of March 3, 1851 (9 Stat. 635), which was later carried into the Revised Statutes as Section 4281, *et seq.*, and is now designated as 46 U. S. Code, Secs. 181-186. The original text of the Act of March 3, 1851, is set forth in *Norwich Co.* v. *Wright*, 13 Wall. 104, at pp. 105-106, and the relevant sections of the original text together with their present wording in the U. S. Code are printed in Appendix A.

Section 1 of the Act of March 3, 1851 (now 46 U. S. Code 182, formerly R. S. Sec. 4282) is popularly known

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* This was pointed out in *Moore* v. *Am. Transp. Co.*, 65 U. S. 1, at p. 38, shortly after the passage of the Act, and again by Mr. Justice Mathews at p. 533 of 118 U. S.

as the Fire Statute. It contains no reference whatsoever to the liability of the ship *in rem* for loss or damage by fire to merchandise which has been shipped on board, but provides merely: "No owner of any vessel shall be liable to answer" for such loss or damage.*

By Section 5 of the Act of March 3, 1851 (now 46 U. S. Code, Sec. 186, formerly R. S. Sec. 4286), the protection of the statute was extended to a charterer who manned, victualled and operated the vessel, *i. e.*, to a carrier in the position of the "K" Line. That provision of the statute provides that such a charterer "shall be deemed the owner of such vessel" (See 46 U. S. Code, Sec. 186), and that then the vessel "shall be liable in the same manner as if navigated by the owner thereof".

It was not, however, until 1936, or two years after this cause of action arose, that Congress in the Carriage of Goods by Sea Act gave exoneration to the ship against "*in rem*" liability for loss from fire by Section 4, subdivision 2 (b), of that Act which reads:

> "Neither the carrier *nor the ship* shall be responsible for loss or damage arising or resulting from * * * (b) Fire, unless caused by the actual fault or privity of the carrier; * * *." (Italics ours.) (46 U. S. Code, Sec. 1304, sub. 2 (b).**)

* This and the other quoted references to the Act of March 3, 1851, embody the wording set forth in Title 46 of the United States Code. As appears from Appendix A, the differences between the original wording and that used in the Code are very slight and immaterial.

** The fact that subdivision 2 (b) of Section 4 of the Carriage of Goods by Sea Act of 1936 now gives exoneration to the ship for loss from fire does not render the question presented in the case at bar academic since the provisions of that Act apply only to bills of lading or similar documents of title which are "evidence of a contract for the carriage of goods by sea * * * *in foreign trade*" (46 U. S. Code, Sec. 1300) and it is specifically not "applicable to charter parties" (46 U. S. Code Sec. 1305). Thus, in respect of goods carried pursuant to charter parties and also

[Footnote continued on following page]

Petitioners' Position.

Our position is that the decision here should be in favor of the petitioners because the liabilities here sought to be enforced are *in rem* liabilities arising from the breach of a master's bill of lading which created a maritime lien on the vessel and were wholly separate and independent of any *in personam* liability on the part of the vessel-owner or of the carrier and that there was no provision of a statute of the United States until 1936 which gave *the vessel* any exemption from its *in rem* liability for loss by fire, the Fire Statute (Sec. 1 of the Act of March 3, 1851, now 46 U. S. Code, Sec. 182) by its terms merely exempting the "owner" and bareboat charterer from personal liability for such losses.

Although the Act of March 3, 1851, may be a remedial statute, we submit that the Fire Statute as now construed in *Earle & Stoddart v. Wilson Line*, 287 U. S. 420, and in the decision in this case, holding that the statute exempts the shipowner from liability *in personam* even when a fire is caused by unseaworthiness arising from gross negligence on the part of those in charge of the ship, goes beyond any other exemption allowed a common carrier against negligence known to the law. The Courts in thus holding did so because they were of opinion that the language of the statute required that they so hold. Obviously, the statute should not be construed as extending such a broad exoneration to the separate liability of the ship *in rem* unless it is equally clear from

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[Footnote continued from preceding page.]

in respect of goods carried under bills of lading covering coastal and inter-coastal voyages and voyages on the Great Lakes and our inland waterways, the Fire Statute remains the only statutory exemption relating to losses by fire. Furthermore, that Act expressly provides in Section 1308 that its provisions "shall not affect the rights and obligations of the carrier under the provisions of sections 175, 181 to 188 and 801 to 842 of this title", which embraces the Fire Statute.

the language of the statute that Congress intended that such exemption should apply to the vessel itself as well as to the shipowner; and this is particularly true since such an extension to include the ship's liability *in rem* would be inconsistent with the nature of a maritime lien fundamental to our admiralty jurisprudence. So far from any such mandate existing, we submit that the statute itself contains within its own bounds language showing that Congress never had any intention of extending the exemption to the ship or to a master's contract. There are two sections in the statute which give the shipowner exemption from liability. The first section gives the shipowner relief against fire. The second section gives both the master and the shipowner relief against embezzlement or loss of valuable goods. However, the sixth section expressly provides that the Statute shall not—

> "take away or affect the remedy to which any party may be entitled, against the master, officers, or seamen, for or on account of any embezzlement, injury, loss, or destruction of merchandise, or property, put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel" (46 U. S. Code, Sec. 187; Appendix A, pp. 45-46).

Moreover, Congress, in enacting the Fire Statute, referred only to the owner's personal liability and did not refer to the ship's *in rem* liability whereas, later, in enacting the Carriage of Goods by Sea Act of 1936, it specified that "neither the carrier nor the ship shall be responsible * * *" (46 U. S. Code, Sec. 1304, sub. 2). Judge Hough was one of the American Commissioners who attended the

International Conference at Brussels which adopted the Convention, signed August 25, 1924, which was later carried into our law by the Carriage of Goods by Sea Act. When it is noted that his article in defense of the admiralty lien and suits *in rem* appeared in the March, 1924, issue of the Harvard Law Review (37 Harvard Law Review, p. 529), it is obvious that the exemption of "the ship", as such, in the Act of 1936 could not have found its way into that statute through inadvertence.

It is of interest also to note that when Congress enacted the Harter Act (Act of February 13, 1893, now 46 U. S. Code, Secs. 190-196; Appendix B, pp. 46-48), it used express words when it exempted the vessel, in addition to her owner or charterer, from liability for the causes of loss set forth in Section 3 of that Act. Section 3 is the only paragraph of that Act which grants exemptions to the vessel and the owner (see 46 U. S. Code, Sec. 192). There the language is: "Neither *the vessel*, her owner or owners, agents, or charterers shall become or be held responsible for damage or loss", etc. (Italics ours), and the same language is repeated as to other exemptions later in the same section. But significantly fire is not one of the perils there exempted against. In fact, Section 6 of the Act of February 13, 1893 (27 Stat. 446; now 46 U. S. Code, Sec. 196; Appendix B, at p. 48) expressly provided that:

> "This act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two"—the Fire Statute—"and forty-two hundred and eighty-three of the Revised Statutes of the United States, or any other statute defining the liability of vessels, their owners, or representatives."

The contract here is a master's contract, and the loss was due to bad stowage, which was the master's duty to do properly (*The Nidarholm*, 282 U. S. 681, 684, and cases

there cited; in addition see particularly *The Delaware*, 14 Wall. 579, 604, and Judge Brown's decision in *The Centurion*, 57 Fed. 412, 416). The breach of that contract created a maritime lien or right *in rem* against the vessel. See cases at pages 16-17, *infra*.

Section 2 of the Act of March 3, 1851, now 46 U. S. Code, Section 181, grants exemption to "the master and owner of such vessel, * * * as carriers" for loss of valuable shipments. It has been held that this exemption is given in respect of the carrier's liability only and that it does not extend to the shipowner's liability as bailee. *Kuhnhold v. Compagnie Generale Transatlantique*, 251 Fed. 387, at p. 389; *Wheeler v. Oceanic Steam Navigation Co.*, 125 N. Y. 155, 26 N. E. 248, 21 Am. St. Rep. 729; *Mallory S. S. Co. v. Bahn* (Tex. Civ. App.), 154 S. W. 282; *La Bourgogne*, 144 Fed. 781, at p. 786, 75 C. C. A. 647; affirmed in 210 U. S. 95. If Congress had intended in Section 1 to exempt the master from the breach of his contract and the ship from the maritime lien which arises in consequence of the breach, it is strange that no words in Section 1 refer to the master's liability as they do in Section 2.

In *Wheeler v. The Oceanic Steam Navigation Co.*, 125 N. Y. 155, at 160, the Court, notwithstanding the sweeping words which deny liability of the carrier "in any form or manner", refused to extend the denial of liability granted by the statute to a loss due to the breach of duty of a vessel owner as a bailee for hire, on the ground that the statute gave exemption only to the owner "as carrier".

The *Wheeler* case was expressly approved by the Circuit Court of Appeals for the Second Circuit in *La Bourgogne*, 144 F. 781, 786. The latter case then came to this Court "on writ and cross-writ of certiorari" (210 U. S. 95). One of the points raised by the shipowner in its petition was that the Circuit Court of Appeals erred

in following the *Wheeler* case. The shipowner-petitioner gave much space in its brief to discussing that subject. Although this Court did not discuss the subject at length in its opinion (210 U. S. 95), it affirmed the decree of the Circuit Court of Appeals and it did say in its opinion, at page 141, that it had not overlooked these points, but had considered them all.

This analysis of the statutes demonstrates that when Congress has given exemption to vessels, carriers, masters, or shipowners, it has used words carefully to indicate exactly to whom and to what liabilities it has given an exemption. Here the Court is asked to extend the exemption of fire, granted to "owners" by the Fire Statute, to a contract made by a master, as master, and not as agent of the owner, and, further, to take away from cargo owners the lien, or *in rem* liability of the vessel, which the Maritime law imposes for the breach of such a contract, although the statute contains no words indicating that Congress ever had any such intention. We submit that the reasoning in *Wheeler v. Oceanic Steam Nav. Co.*, 125 N. Y. 155, adopted in *La Bourgogne, supra*, is conclusive against such an extension. There the Court said (p. 160):

> "The liability of the carrier as such was well understood by the framers of the statute. It had long been settled so that no one could mistake it. By force of his public employment, he became an insurer of the property entrusted to his care, and liable for its loss, irrespective of the cause, unless from the act of God or the public enemy. But involved in this greater liability and absorbed by it was a lesser liability as bailee for hire; of no consequence while the greater liability existed, but surviving the destruction of that, so that when the carrier ceased to be liable as carrier, he yet remained liable as bailee" (125 N. Y. at p. 160).

So here, it was well understood by the members of Congress who enacted the law of March 3, 1851, especially those members from New England, the proponents of the statute, men brought up literally under the eyes of Mr. Justice Story and Judge Ware, that the liability of a ship *in rem* was quite a different thing from the liability of an owner *in personam* and that a master's bill of lading had a significance quite different from a carrier's bill of lading. Indeed, we submit that there is even less reason to extend the section of the statute relating to fire to a ship's liability, than there was to extend the statute relating to valuables so as to relieve those who operate ships from a bailee's liability.

That Congress in drawing up the Act of March 3, 1851, was, in fact, not unmindful of the *in rem* liability of a ship, as distinguished from the personal liability of a shipowner or operator, is also demonstrated by the careful wording employed in Section 5 of that Act (now 46 U. S. Code, Sec. 186, See Appendix A, at p. 45). After providing that a bareboat charterer shall be deemed an owner within the meaning of the Act, Congress was careful to specify that a "vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof". In *The Barnstable*, 181 U. S. 464, this Court said at p. 468 that "the liability of the vessel for the negligence of the charterers is now fixed by statute in this country", citing the foregoing section.

In view of the foregoing, it is manifest that the extension by the Court below to the ship *in rem* of the exoneration granted by the Fire Statute to "owners" constitutes in reality an amendment of the Act. As we shall show below, this "judicial legislation" is wholly unjustified and is in defiance of well settled principles of the admiralty law.

The Legal Right Here Sought to Be Enforced Is That of Petitioners Against the Vessel Under a Master's Contract Executed as Master and Not as Agent for the Owner.

A breach of a contract of affreightment occurring, as is here the case, after the goods have been shipped on board the vessel, creates a right *in rem* against the vessel. This is well settled by many decisions of this Court. See *Dupont* v. *Vance*, 19 How. 162, where this Court said (p. 168):

> "The right of the shipper to resort to the vessel for claims growing directly out of his contract of affreightment, has very long existed in the general maritime law. It is found asserted in a variety of forms in the Consulado, the most ancient and important of all the old codes of sea laws, (see Chap. 63, 106, 227, 254, 259) and the maxim that the ship is bound to the merchandise, and the merchandise to the ship, for the performance of the obligations created by the contract of affreightment, is a settled rule of our maritime law" (19 How. at pp. 168-9).

See also, *The Keokuk*, 9 Wall. 517, at p. 519; *The Belfast*, 7 Wall. 624, at p. 642; *The Eddy*, 5 Wall. 481, at p. 494; *The Delaware*, 14 Wall. 579, at p. 596; *The Maggie Hammond*, 76 U. S. 435, at p. 449; and *Krauss Bros. Lumber Co.* v. *Dimon S. S. Corp.*, 290 U. S. 117, at p. 121.

The law is the same when the ship is operated by a bareboat charterer who has entire control of the vessel. This Court so held in *Schooner Freeman* v. *Buckingham*, 18 How. 182. In that case this Court said (p. 189):

> "We are of opinion that, under our admiralty law, contracts of affreightment, entered into with the master, in good faith, and within the scope of his apparent authority as master, bind the vessel to the merchandise for the performance of such contracts,

wholly irrespective of the ownership of the vessel, and whether the master be the agent of the general or the special owner.

"* * * when the general owner intrusts the special owner with the entire control and employment of the ship, it is a just and reasonable implication of law that the general owner assents to the creation of liens binding upon his interest in the vessel, as security for the performance of contracts of affreightment made in the course of the lawful employment of the vessel" (18 How. at pp. 189, 190).

To similar effect see *The Seaboard*, 119 Fed. 375, at p. 376; *The Alert*, 61 Fed. 113, at p. 115; and the rulings of that eminent admiralty authority, Judge Addison Brown, in *The T. A. Goddard*, 12 Fed. 174, at p. 178. The principle has been consistently followed; the latest application is, we believe, the decision of Judge Leibell in *The Lafcomo*, 1943 A. M. C. 572, at p. 576. It is also recognized and embodied in Section 5 of the Act of March 3, 1851, now 46 U. S. Code, Sec. 186. (See Appendix A, at p. 45.) The bills of lading in this case (Ex. 9—R. 30 A) on their face show that they were executed "For Master". The very purpose of execution in this form is to bind the vessel. Such a form is commonly used where the bills of lading are issued by a voyage or by a time charterer so as to make certain to the cargo owner the additional security of a maritime lien. As to its binding effect on the ship *in rem*, see, among others, *The Capitaine Fayre*, 10 F. (2d) 950, at pp. 960-1, 963; *The Poznan*, 276 Fed. 418, at p. 432; *The Themis*, 275 Fed. 254, at p. 263; and *The Esrom*, 272 Fed. 266, at pp. 269, 272, 273. See also *The Phebe*, Fed. Cases No. 11,064, discussed in detail at pages 24-25 and pages 31-32, *infra*.

In view of the foregoing, it is clear that there is no basis for the doubt which apparently lingered in the

mind of the Court below where Judge Hand wrote: "Whether, if the charterer were liable *in personam*, a lien would attach to the ship on the theory that a bareboat charterer is the owner *pro hac vice*, we need not say * * *" (R. 63-4). We submit that this failure to recognize the existence of your petitioners' maritime liens against the "Venice Maru" was one of the reasons which led to the erroneous conclusion reached below.

The principle that maritime liens binding on the vessel may arise while it is in the exclusive possession of a bareboat charterer is not confined to cargo damage cases. See for example, among others, *The Spartan*, 1 Ware 130, Fed. Cases No. 11,246; *The Artisan*, 9 Ben. 106, Fed. Cases No. 568; *The Samuel Ober*, 15 Fed. 621; *The International*, 30 Fed. 375; *The L. L. Lamb*, 31 Fed. 29; *The Gen. J. A. Dumont*, 158 Fed. 312, 314; and *The Chester*, 25 F. (2d) 908, 910, all cases upholding a maritime lien, or right *in rem* against the ship, for wages due seamen hired by a master who was not the servant of the vessel owner but who had been appointed by the bareboat charterer.

See also *The Barnstable*, 181 U. S. 464, at p. 467.

In summary, it is clear that your petitioners by reason of the damage sustained by their cargo subsequent to its being loaded and while still on board the "Venice Maru", became vested with maritime liens, or rights *in rem*, against that vessel. We have shown at pages 8-9, 13-15, *supra*, that the Fire Statute does not in terms relieve a ship or a master from the breach of a master's contract. Notwithstanding the absence of words in the statute exempting the vessel from liability for fire, the Circuit Court of Appeals held that because the statute relieved the shipowner and the owner *pro hac vice* from liability *in personam*, it thereby relieved the vessel from liability *in rem*, *i. e.*, divested your petitioners of their maritime

liens. As a reason for so holding, the Court said: "To say that an owner is completely exonerated although one may arrest his ship and sell it, is a contradiction in terms, unless we are to think of the ship as a jural person capable of wrongdoing" (R. 63). This statement, we submit, ignores the distinction drawn by Judge Ware in *The Phebe*, 1 Ware 263, Fed. Cases 11,064 (Appendix C). In that case Judge Ware points out that a contract such as that involved here does not exist because of any agency vested in the master, but because by the custom of the sea, which for ages has been embodied in the Maritime law, the master has, as master, the right to make contracts binding on the vessel of which he is master. It is also well settled law that when an owner of a ship permits a ship to be operated by a shipmaster and such master enters into a contract of carriage, the vessel becomes "impliedly hypothecated to secure the performance of the contract", to use the words of the present Chief Justice in *Krauss Bros. Lumber Co. v. Dimon S. S. Corp.*, 290 U. S. 117, at p. 121, since once the cargo is laden on board, the ship itself "is made answerable for non-performance" (p. 121 of 290 U. S.). It also ignores the fact, there pointed out, that "this engagement of the vessel or its hypothecation" is a separate liability "as distinguished from the personal obligation of the owner" (p. 121 of 290 U. S.).

Thus on analysis, the reasoning employed by the Court below will be seen to strike at the foundation of the American concept of a maritime lien as being a *jus in re* and not merely a *jus ad rem.* This principle is long and firmly established as an integral part of our admiralty law. It was succinctly stated by Mr. Justice Grier in *The Yankee Blade*, 19 How. 82 (a cargo damage case), as follows (p. 89):

> "The maritime 'privilege' or lien is adopted from the civil law, and imports a tacit hypothecation of the subject of it. It is a '*jus in re*', without actual

> possession or any right of possession. It accompanies the property into the hands of a bona fide purchaser. It can be executed and divested only by a proceeding *in rem*. This sort of proceeding against personal property is unknown to the common law, and is peculiar to the process of courts of admiralty" (p. 89 of 19 How.).

The foregoing was quoted with approval by Mr. Justice Gray in *The Glide*, 167 U. S. 606, at p. 612, and more recently in *Osaka Shosen Kaisha v. Lumber Company*, 260 U. S. 490, at pp. 496-8. The fallacy of voiding the maritime lien because of lack of liability on the part of the owner is graphically illustrated by the fact that it can be enforced even after the ship has passed "into the hands of a bona fide purchaser". To like effect see also, among others, *Insurance Co. v. Baring*, 20 Wall. 159, 163; *The John G. Stevens*, 170 U. S. 113, 120; *Parson v. Cunningham*, 63 Fed. 132 (C. C. A. 1); and particularly the learned opinion of Mr. Justice Curtis in *The Young Mechanic*, 2 Curt. 404, Fed. Cases No. 18,180. After discussing the historical origin and the nature of maritime liens, Mr. Justice Curtis there said:

> "It is not merely a privilege to resort to a particular form of action to recover a debt. The maritime law, following the Roman, distinguished between actions and privileges, and held that actions do not make hypothecations. Emerigon, Con. a la Grosse, c. 12. Sec. 1. It is an appropriation made by the law, of a particular thing, as security for a debt or claim; the law creating an incumbrance thereon, and vesting in the creditor, what we term a special property in the thing, which subsists from the moment when the debt or claim arises, and accompanies the thing even into the hands of a purchaser. * * * A right which enables a creditor to institute a suit, to take a thing from any one who may possess it, and subject it, by a sale, to the payment of his debt; which

so inheres in the thing as to accompany it into whosoever hands it may pass by a sale; which is not divested by a forfeiture or mortgage, or other incumbrance created by the debtor, can only be a jus in re, in contradistinction to a jus ad rem; or in contradistinction to a mere personal right or privilege. Though tacitly created by the law, and to be executed only by the aid of a court of justice, and resulting in a judicial sale, it is as really a property in the thing as the right of a pledgee or the lien of a bailee for work. The distinction between a jus in re and a jus ad rem was familiar to lawyers of the middle ages, and is said then to have first come into practical use, as the basis of the division of rights into real and personal. Saund. Intro. to Just. p. 49. A 'jus in re' is a right, or property in a thing, valid as against all mankind. * * * For it has been settled so long, that we know not its beginning, that a suit in the admiralty to enforce and execute a lien, is not an action against any particular person to compel him to do or forbear any thing; but a claim against all mankind; a suit in rem, asserting the claim of the libellant to the thing, as against all the world. * * * But if, as I think, it is a real and vested interest in the thing, constituting an incumbrance placed thereon by operation of law, to be executed by a judicial process against the thing, to which no person is made a party, save by his voluntary intervention and claim, then *the inability to maintain a suit against the administrator, and the incapacity to make any attachment of the property of the deceased in such a suit*, though they may amount to infirmities in the remedy when pursued in the state courts, *do not affect the right of the creditor, nor his remedy in the admiralty*" (30 Fed. Cases at pp. 875-6). (Italics ours.)

The narrow construction placed by the Court below upon your petitioners' rights *in rem* as being measured

by and dependent upon the existence of an *in personam* liability of the vessel owner plainly conflicts with the concept of the nature of maritime liens as set forth in the foregoing authorities; and the conclusion reached by the Court below squarely conflicts with the decision in *The Young Mechanic, supra.**

The attack made below upon the nature of a maritime lien for cargo damage and upon the opinion of the Circuit Court of Appeals for the Fifth Circuit in *The Etna Maru*, 33 F. (2d) 232, because the latter Court adhered to the well settled principle of maritime law as to the nature of rights *in rem*, falls within the category of similar attacks against the maritime law which brought forth the well known article by the late Honorable Charles M. Hough entitled "Admiralty Jurisdiction—of Late Years", 37 (March, 1924) Harvard Law Review, p. 529.** Judge Hough, as an old practitioner of the Admiralty, came to its defense with vigor. He took exception to "the tone of mockery displayed in every reference to the doctrine of a lien attaching regardless of the shipowner's personal liability" (p. 543). That article was indeed Judge Hough's reply to those whom he considered as unsympathetic critics of the just and equitable principles of the admiralty, to whose maintenance he had devoted his life. Throughout his article, time and again,

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* *The Young Mechanic, supra*, has frequently been cited with approval not merely by the lower Federal Courts, but also by this Court. See *Vandewater* v. *Mills* (*The Yankee Blade*), 19 How. 82, 90; *The Kalorama*, 10 Wall. 204, 212; *Ins. Co.* v. *Baring*, 20 Wall. 159, 163; *The J. E. Rumbell*, 148 U. S. 1, 10; *Moran* v. *Sturges*, 154 U. S. 256, 282; *The John G. Stevens*, 170 U. S. 113, 117; and *The Carlos F. Roses*, 177 U. S. 655, 666.

** See particularly p. 541, where Judge Hough said: "It is the safest of assertions that the mainspring of effective admiralty power is the maritime lien. The American concept of that *jus in re*, as a proprietary interest in an offending *res* arising contemporaneously with the cause of action, is elementary learning, resting on the authority of classical decisions of the Supreme Court. In the whole maritime anthology of that Court, no single flower is so important."

he mentions "the Admiralty tradition", which he feared was in process of destruction. He recalled that this tradition was introduced in the decisions of this Court by Story, *J.*, and was kept alive in this Court by a series of distinguished judges. For Judge Hough the matter discussed was personal as well as legal. For him the memory and life work of Story, Curtis, Clifford, Grier, Blatchford, Swaine, Taney, Gray and Henry Billings Brown was worthy of defense. It was the memory and achievement of these men which needed defense, as well as the principle involved. The question now presented to this Court is, therefore, of deeper significance than the narrow one couched in legal language, which we submitted in our petition. It is: Is this Court to discard the Admiralty tradition?

The ruling of the Circuit Court of Appeals herein rests on two legal premises, namely (1) that the ship's liability *in rem* is to be measured by, and is only co-extensive with, the owner's liability *in personam*, and (2) that personification of the ship as the basis for the creation and enforcement of maritime liens, apart from, and even in the absence of, any liability on the part of her owner, "is a bit of mythology" (R. 63). We submit that both of these propositions are squarely contrary to the well settled principles of American admiralty law.

I.

The liability of the ship created by a master's bill of lading is wholly separate and independent of any liability on the part of her owner.

We have already shown (p. 3) that the bills of lading covering the cargo loaded on board the "Venice Maru" were executed by the bareboat charterer "For Master".

(See Exhibit 9, R. 30 A.) The error into which the Court Below fell apparently arose in part from its failure to give weight to this fact. However, because of the form in which the bills of lading were executed, there can be no question but that the "Venice Maru" was thereby bound *in rem;* and it is equally well settled that such liability, so created, is a distinct and separate liability, entirely unrelated to and independent of any liability on the part of her owner or bareboat charterer. Both the foregoing propositions are well settled in the general maritime law as adopted into our American admiralty law as is most clearly shown by Judge Ware's scholarly opinion in *The Phebe*, 1 Ware 263, Fed. Cases, No. 11,064 (See Appendix C, p. 48). That case also involved damage to cargo; there, as is the situation in the case at bar, the owner had let his ship under bareboat charter and the suit was in a master's bill of lading. After a careful review of the authorities and the principles on which they rested, Judge Ware held that the owner was discharged of all liability for the breach of the contracts involved because he had not authorized the master to bind him, but that the vessel was, nevertheless, liable *in rem* for such breach. Judge Ware there pointed out:

> "This rule, by which the vessel is bound in specie for the acts of the master, is not derived from the civil law, but has its origin in the maritime usages of the middle ages; and it is to these usages that we must look to ascertain its true character. * * *
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> * * * Thus we find, when the principle is traced back to its source, that *it is by no means correct to say that the liability of the vessel is merely collateral or accessory to that of the owner.* On the contrary, in the origin of the custom the primary liability was upon the vessel, and that of the owner was not personal but merely incidental to his ownership, from which he was discharged either by the loss of the

vessel or by abandoning it to the creditor" (19 Fed. Cases at pp. 420, 421).* (Italics ours.)

In *Schooner Freeman* v. *Buckingham*, 18 How. 182, Mr. Justice Curtis, speaking for this Court, said at p. 189:

"In the case of *The Phebe*, Ware's R. 263, Judge Ware has traced the power of the master to bind the vessel by contracts of affreightment to the maritime usages of the middle ages. So far as respects such contracts made by the master in the usual course of the employment of the vessel, and entered into with a party who has no notice of any restriction upon that apparent authority, those maritime usages may safely be considered to make part of our law; * * *."

That the *in rem* liability of a ship for the breach of a contract of carriage binding on it is to be "distinguished from the personal obligation of the owner" was also pointed out by the present Chief Justice in *Krauss Bros. Lumber Co.* v. *Dimon S. S. Corp.*, 290 U. S. 117, at p. 121.

The bills of lading of the "Venice Maru" were in the usual form of a master's bill of lading. They were all signed "For Master". It follows that the contracts here involved are effective as master's contracts and bound the ship. The bills of lading by their terms contemplated a liability on the part of the vessel as well as on the part of the carrier. They specifically provide that upon delivery of the cargo to the consignee, "the vessel's and the carrier's liability shall cease" (R. 30 A). There has never been any suggestion that there has ever been any liability under these contracts on the part of the owner, Kawasaki Zosenjo, since, concededly, Kawasaki Zosenjo had nothing to do with the operation or control of the "Venice Maru" (Find-

* The purpose of the Act of March 3, 1851, was to incorporate into our admiralty law this ancient principle of the general maritime law that a vessel owner can obtain release of his liability *in personam* by the surrender of the vessel. See, in particular, *The Scotland*, 105 U. S. 24, at p. 28.

ing 1, R. 40). How then can it be said that a statute which protects *a shipowner* from loss by fire operates to protect a master and the vessel hypothecated as security for his contract from losses by fire when such statute does not mention the master or the ship?

II.

As a matter of law, it is well established that a vessel may be liable for loss or damage when the owner is not liable.

The proposition stated in the heading is well illustrated by *The Barnstable*, 181 U. S. 464, an action *in rem* for collision damage inflicted as a result of negligent navigation on the part of her officers and crew who had been hired by the bareboat charterer. Obviously, since they were not the agents or servants of her owner, the latter was not liable for their acts. In holding, however, that the vessel itself was liable *in rem* for the damage so caused, this Court, through Mr. Justice Brown, said at p. 467:

> "Whatever may be the English rule with respect to the liability of a vessel for damages occasioned by the neglect of the charterer, as to which there appears to be some doubt, *The Ticonderoga*, Swabey, 215; *The Lemington*, 2 Asp. Mar. Law Ca. 475; *The Ruby Queen*, Lush. 266; *The Tasmania*, 13 P. D. 110; *The Parlement Belge*, 5 P. D. 197; *The Castlegate* (1893), App. Ca. 38, 52; *The Utopia* (1893), App. Cas. 492, the law in this country is entirely well settled, that the ship itself is to be treated in some sense as a principal, and as personally liable for the negligence of any one who is lawfully in possession of her, whether as owner or charterer. *The Little Charles*, 1 Brock. 347, 354" (p. 467 of 181 U. S.).

Conversely, this Court decided in *Homer Ramsdell Transportation Co. v. Compagnie Generale Transatlantique*, 182 U. S. 406, that in that case the owner was not liable although its vessel would have been liable if sued *in rem*.

That there is a maritime liability *in rem*, distinct from a liability *in personam*, was also recognized by this Court in *The China*, 7 Wall. 53. In that case this Court stated almost the same question as that now presented before this Court. The Court stated it as follows (p. 67):

> "The argument for the appellants proceeds upon the general legal principle that one shall not be liable for the tort of another imposed upon him by the law, and who is, therefore, not his servant or agent" (7 Wall. at p. 67).

This Court, in rejecting this argument, gave the following reason to support its position (p. 68):

> "The maritime law *as to the position and powers of the master, and the responsibility of the vessel*, is not derived from the civil law of master and servant, nor from the common law. It had its source in the commercial usages and jurisprudence of the middle ages. *Originally, the primary liability was upon the vessel, and that of the owner was not personal, but merely incidental to his ownership*, from which he was discharged either by the loss of the vessel or by abandoning it to the creditors. But while the law limited the creditor to this part of the owner's property, it gave him a lien or privilege against it in preference to other creditors" (7 Wall. at p. 68). (Italics ours.)

It cites *The Phebe*, 1 Ware 263, Fed. Cases No. 11,064, and *The Creole*, 2 Wallace, Jr. 485, Fed. Cases No. 13,033, as authorities.

Here, as there, it is "the responsibility of the vessel" with which we are concerned. It is not the responsibility of the owner. The responsibility of the vessel "is not derived from the civil law of master and servant, nor from the common law". "It had its source in the commercial usages and jurisprudence of the middle ages". The Court was well fortified in the opinions of Judge Ware in *The Phebe*,* *supra*, and of Mr. Justice Grier in *The Creole*, *supra*, in making this statement. In *The Creole*, Mr. Justice Grier said (p. 597 of 22 Fed. Cas.):

> "Thus far I have considered the question on the principles peculiar to the common or civil law relating to master and servant, rather than those of the maritime law. The proceeding in this case is *in rem*, for a maritime tort. The rights and remedies of the libellants are to be tested by the principles of that law, unaffected by any statutory provisions. A proceeding *in rem*, in admiralty, is not a mere attachment to compel the appearance of the owners, as in civil law proceedings, and attachments under the custom of London, which are not proceedings *in rem* in the admiralty sense of the phrase. The court of admiralty proceeds on the principle that *the vessel itself is hypothecated by the contracts*, as well as the obligations arising *ex delicto* of the master, and is herself liable for all maritime liens. The owners and others interested, are allowed to intervene *pro interesse suo;* and for convenience of trade and commerce, are permitted to release the vessel, by substituting their stipulation and security in its place. *But the property attached is, in all cases, treated as the debtor, and primarily liable.*
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> By the maritime law, the power of the master to bind the owners by his obligations *ex delicto*, did not extend beyond the tacit hypothecation of the property in his possession. By surrendering the

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* See Appendix C.

hypothecated vessel, the owners escape further liability, or, if they intervene, cannot be made liable beyond her value.

These principles which prescribe the powers of the master of a vessel, are not drawn from the doctrine of the civil law concerning the relation of master and servant, but had their origin in the maritime usages of the middle ages. By these the ship was bound to the merchandise and the merchandise to the ship; and both are bound for the mariners' wages, 'even to the last nail of the ship'. By these the master was authorized to bind the vessel by bottomry. And by these the vessel becomes hypothecated for the obligations of the master arising *ex delicto*, and is herself treated as the debtor or offender. Hence, also, the vessel became bound to those who dealt with the master, whether he was appointed to act as their agent, or the ship was let to him on charter-party. It is unnecessary to make an array of the various European writers on this subject, as authority for these statements. I refer for them to the opinions of Judge Ware, in the cases of *Poland v. The Spartan* (Case No. 11,246); *The Rebecca* (Id. 11,619) and *The Phebe* (Id. 11,064), in which the origin and principles of maritime law affecting the liability of vessels for the contracts of the master, are treated with the ability and research which distinguished that judge" (p. 507 of 22 Fed. Cas.). (Italics ours.)

This it appears that when the bills of lading in the case at bar were executed "For Master", the "Venice Maru" became hypothecated for the performance of the contract. No personal contract in any way binding upon the vessel owner was entered into as a result. The vessel, not the owner, was the debtor. Indeed, this was so clearly the law, that even before there was any Act of 1851 limiting the shipowner's liability, the shipper who held a master's contract could not sue the owners for any damage which

he might sustain while his goods were in the vessel's custody unless the owner had assented to the contract. There is nothing in the Act of March 3, 1851, which indicates that Congress intended to interfere with or change that liability of a master or of a vessel hypothecated for the proper performance of the master's contract. It did not provide in that Act that a contract made by the master of a vessel should be binding upon the owner of the vessel, nor did it provide that the obligations imposed on the vessel by the contract of the master as it bound the vessel should in any manner be lessened. It is not to be supposed that Congress did not know what it was about. In this connection, it should be noted that Section 6 of the Act of 1851 (now 46 U. S. Code, Sec. 187) specifically provides that "nothing in the preceding sections shall be construed to take away or affect the remedy to which any party may be entitled against the master, officers or mariners * * *" while in the last part of Section 5 (now 46 U. S. Code, Sec. 186) Congress had taken care to provide that in cases involving a bareboat charter the *in rem* liability of the vessel should nevertheless continue.

In the Harter Act (Act of February 13, 1893, c. 105, 27 Stat. 445; now 46 U. S. Code Secs. 190-196; Appendix B), Congress dealt with a similar problem. There it expressly forbade "the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports, to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby *it*, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in * * * proper delivery of any and all lawful merchandise or property committed to *its* or their charge" (italics ours) (46 U. S. Code, §190). The use of the words "it" and "its" in this statute can only mean that Congress dealt with the vessel's liability as well as that of the owner. A mere reading of this statute should remove any notion that Congress was

unable to express itself intelligently on this important subject. The foregoing constitutes the first section of the Harter Act (Appendix B). The second section of that Act, which is in almost the same language, differs from the first section in that the prohibition is directed to "the obligations of the owner or owners of said vessel to exercise due diligence to properly equip, man and provision and outfit said vessel", etc. (46 U. S. Code, 191). And in Section 3 of that Act where Congress conferred exemptions, it took care to specify: "neither the vessel, her owner or owners, agent or charterers" (46 U. S. Code, Sec. 192). A mere reading of these sections demonstrates beyond doubt that Congress realized the difference between a vessel's and an owner's liability as defined by this Court in *The China*, by Mr. Justice Grier in *The Creole*, and by Judge Ware in *The Phebe*, all *supra*.

We now turn to the "high authority of Judge Ware",* upon whose research Mr. Justice Grier in *The Creole* stated he relied.

The Phebe, 1 Ware 263, Fed. Cas. No. 11,064, cited both by this Court in *The China* and by Mr. Justice Grier in *The Creole*, was a case where a vessel, owned by one person, was operated by another, under a bareboat charter, as was the case here. Damages to cargo had been sustained. The contention was made that there was no personal liability on the owner, hence his ship could not be liable for these damages. Judge Ware held that, although this might be true if the applicable law were the common or civil law, it was not true in the case before him, because the applicable law was the Maritime law. Counsel for cargo rested their argument on two grounds: (1) an implied agency; and (2) the rule of the Maritime law that permitted the master to bind the ship by virtue

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* Benedict, *J.*, in *The Kate Tremaine*, 5 Ben. 60, F. C. No. 7622, 14 F. C. at p. 146.

of his position as master rather than as agent of the owner. Judge Ware rejected the first contention, but adopted the second. (See Appendix C, p. 48.)

After rejecting any liability based upon the common law and civil law rules as to agency, Judge Ware carefully reviewed the Maritime codes and authorities, and demonstrated that the master's authority to enter into a contract binding the ship is created by the Maritime law itself and that "it is by no means correct to say that the liability of the vessel is merely collateral or accessory to that of the owner." He shows that it is distinct from that of the owner and exists because the ship has been placed in maritime trade, and that for the convenience of trade and to insure the performance of the contracts of the master the Maritime law gives the merchant the legal right to look to the ship and freight for the performance of the contract. He points out that the right of the seamen to look to the ship and freight for their wages rests upon the same principle —see his decision in *The Spartan*, 1 Ware 130; Fed. Case No. 11,246. In that case, but for this beneficent principle of the Maritime law, the seamen would have remained unpaid. See also in particular *The Chester*, 25 F. (2) 908, 910, where a like situation was involved.

Mr. Justice Curtis, speaking for this Court, in *Schooner Freeman v. Buckingham*, 18 How. 182, at page 189, 190 stated that the ~~principles laid down~~ by Judge Ware in *The Phebe*, *supra*, "may safely be considered to make part of our law". Similarly, Judge Ware's decision was specifically approved by Mr. Justice Grier in *The Creole*, *supra*. Since the language in *The Creole* was used almost verbatim by this Court in *The China*, *supra*, and this Court cites *The Phebe* as authority for its own statement of the law in *The China*, we submit that the question is not an open one, but has in fact been decided by this Court in *The China*, *supra*.

As we have said above, in *Homer Ramsdell Trans. Co. v. Compagnie Generale Transatlantique*, 182 U. S. 406, this Court expressly held that, although a vessel would have been liable *in rem* under the facts of that case, the owner was not liable *in personam.* The incidence of ownership imposed no liability upon the owner. The *Homer Ramsdell* case dealt with the personal liability of the shipowner for the negligence of a compulsory pilot and held that there was no personal liability for such negligence, although in *The China, supra,* it had been held that in such a case the vessel would be liable *in rem.* It cited *Ralli v. Troop,* 157 U. S. 386; *The John G. Stevens,* 170 U. S. 113; and *The Barnstable,* 181 U. S. 464; and quoted (p. 413 of 182 U. S.) the following language from *Ralli v. Troop*:

> "That decision [*The China*] proceeded, not upon any authority or agency of the pilot, derived from the civil law of master and servant, or from the common law, as the representative of the owners of the ship and cargo; * * * *but upon a distinct principle of the maritime law, namely, that the vessel, in whosoever hands she lawfully is, is herself considered as the wrongdoer, liable for the tort, and subject to a maritime lien for the damages.*" (*Ralli v. Troop*, 157 U. S. at p. 402.) (Italics ours.)

See also *Schooner Freeman v. Buckingham,* 18 How. 182; *The Barnstable*, 181 U. S. 464; *The Yankee Blade*, 19 How. 82, 89.

And in the *Homer Ramsdell* case, the Court also said:

> "There is no occasion to refer further to the English cases in admiralty, because in England it is held that the ship is not responsible in admiralty, where the owner would not be at common law, differing in this respect from our own decisions." (182 U. S. at p. 413.)

We submit that the question taken up by this Court by its writ of certiorari should be answered by stating that

the Fire Statute, 46 U. S. Code, 182, does not grant any relief in cases *in rem* for breaches of the vessel's contracts of affreightment.

III.

Congress has repeatedly provided that a proceeding *in rem* in accordance with the rule of the Maritime Law shall be used in enforcing laws relating to ships. It has recently provided that the same procedure shall be used to enforce laws relating to airplanes. A decision of this Court affirming the decision below, which declared that a thing may not be guilty when its owner is innocent, may seriously affect the enforcement of these statutes.

As we have shown under the preceding heading, the Admiralty procedure of arrest of a vessel, holding her responsible for breach of a contract or for a maritime tort, is ancient. It was adopted because the common law procedure proved ineffectual. It is stated that Edward III organized the Admiralty courts in England because of his inability to deal effectively with piracy by using the process of the common law courts. See introduction by Marsden to *Select Pleas in the Court of Admiralty*, Selden Soc., Vol. I, pp. xiv, *et seq.* See also "Is the Crime of Piracy Obsolete?", 38 Harvard Law Review 334, 340. Arrest of vessels in suits *in rem* continued in the English Admiralty court until the court was abolished in the time of James I, as a result of the fall of Lord Bacon. For an interesting account of the controversy between Bacon and Coke as it affected English Admiralty law, see *Benedict on Admiralty*, 4th Edition, Chapter VI, pp. 38, *et seq.* The jurisdiction was not revived in England until 1840, when the first of the so-called Admiralty Court Acts was adopted, 3 & 4. Vic., c. 65. This Act was followed by others, all tending to give that Court broader jurisdiction

of matters of title and mortgage of ships, salvage, towage and necessaries, building, equipping and repairing ships, claims on bills of lading and for damage to goods, questions of account between part owners, claims for life salvage and seamen's wages, including master's wages, and jurisdiction of any claim for damage done by any ship (*Benedict on Admiralty*, 4th Ed., pp. 56, 57).

The American Admiralty courts functioned almost from the first days of settlement of the Colonies. See *Benedict*, 4th Ed., pp. 60, *et seq.* The difference between the law in England and that in America grew up because of this difference in the history of the Courts. The difference was commented upon by this Court in *Homer Ramsdell Co. v. Com. Gen. Trans.*, 182 U. S. 406, at p. 413:

> "There is no occasion to refer further to the English cases in admiralty, because in England it is held that the ship is not responsible in admiralty, where the owner would not be at common law, differing in this respect from our own decisions. *The China*, 7 Wall. 53; *Ralli v. Troop*, (1894) 157 U. S. 386, 402, 420; *The John G. Stevens*, (1898) 170 U. S. 113, 120-122; *The Barnstable*, (1901) 181 U. S. 464."

Shortly after the founding of the Government of the United States, our Government also found it useful to provide by statute that the Admiralty process should be used to enforce forfeitures. See *The Palmyra*, 12 Wheaton 1. In that case at page 14 (12 Wheaton) Mr. Justice Story commented upon the distinction between a proceeding at common law and one in admiralty, and emphasized that under the piracy statute "the offence is attached primarily to the thing". He significantly adds: "The same principle applies to proceedings *in rem*, on seizures in the admiralty".

Seizures under revenue laws are also sustained by the same doctrine. *The Apollon*, 9 Wheaton 362.

In *The Brig Malek Adhel*, 2 Howard 210, another piracy case, the master had engaged in piracy, but the owners of the brig were innocent. Nevertheless, the vessel was condemned. This Court, speaking through Mr. Justice Story, said (p. 233):

"It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offence has been done as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof. And this is done from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party" (2 How. at p. 233).

As recently as the case of *The Scow 6-S*, 250 U. S. 269, this Court, in enforcing statutes of Congress prohibiting dumping of refuse in the harbor of New York, said (p. 272):

"The act of Congress here in question imposes a direct liability upon the vessel for the pecuniary penalties prescribed, and declares that it may be proceeded against summarily by libel in any district court of the United States having jurisdiction thereof. This precludes the idea that the proceeding by libel is to be deferred to await the possibly slow course of criminal proceedings against the persons individually responsible. It treats the offending vessel as a guilty thing, *upon the familiar principle of the maritime law*, and permits a proceeding against her in any court of admiralty 'having jurisdiction thereof'—meaning any court within whose jurisdiction she may be found" (250 U. S. at p. 272). (Italics ours.)

And more recently Congress extended the same principle to airplanes. See 49 U. S. Code, Section 181, sub. b.

as amended June 19, 1934, Chap. 656, Sec. 2, 48 Stat. 1116, June 23, 1938, Chap. 601, Sec. 1107 (i) (9), 52 Stat. 1029, where Congress provided that airplanes could only enter the United States at certain designated places; that after so entering they must conform to the immigration and customs regulations; and that:

"*In case the violation is by the* owner or *person in command of the aircraft, the penalty shall be a lien against the aircraft.* Any civil penalty imposed under this section may be collected by proceedings *in personam* against the person subject to the penalty and/or *in case the penalty is a lien, by proceedings in rem against the aircraft. Such proceedings shall conform as nearly as may be to civil suits in admiralty;* except that either party may demand trial by jury of any issue of fact, if the value in controversy exceeds $20, and facts so tried shall not be reexamined other than in accordance with the rule of the common law. The fact that in a libel *in rem* the seizure is made at a place not upon the high seas or navigable waters of the United States, shall not be held in any way to limit the requirement of the conformity of the proceedings to civil suits *in rem* in admiralty. * * *" (Sec. 181, sub. b, Title 49, U. S. Code.) (Italics ours.)

The leading case which has arisen under this statute is that of *United States v. Batre*, 69 F. (2d) 673 (C. C. A. 9). In that case an airplane entered the United States and landed at Florence, Arizona, which had not been designated as a port of entry by the Secretary of the Treasury, and, therefore, the airplane had violated the provisions of the Act and a lien attached to her. To enforce the lien, the United States filed a libel against the airplane. The airplane was claimed by Alma R. Batre, who was the holder of a chattel mortgage on the airplane and who was in no way concerned with the violation of the law. The defense was that the owner of the plane was innocent

and that the inanimate plane could not be guilty of entering the United States intentionally contrary to the law, and that, therefore, the plane was not liable to confiscation. The Court reviewed the various decisions on the question of forfeiture and, after citing *The Palmyra*, 12 Wheaton 1, and quoting at length from the *Brig Malek Adhel*, 2 How. 210, held that the circumstance that the claimant was innocent was irrelevant. The Court significantly added (p. 676):

> "Had the Congress desired an exemption from penalty under this act to apply to innocent third parties, it would have been so stated, as has been done in other enactments" (69 F. (2d) at p. 676).

It may also be said here, that had Congress desired an exemption from "liability" for fire to apply to the contracts of masters, or from "*in rem* liability", it would have so stated.

By the terms of the airplane statute, "the act of the person in charge of the plane" is sufficient to impose a lien upon the airplane, just as the act of a master, the person in charge of a ship, is sufficient to impose a lien on a ship. In short, Congress in this statute adopted the whole of the Admiralty doctrine.

In *Goldsmith-Grant Co. v. United States*, 254 U. S. 505, 511, this Court held that, because Section 3450 of the Revised Statutes provided that, *inter alia*, every carriage, or other conveyance whatsoever, used in the removal, or for the deposit and concealment, of goods removed, deposited or concealed with intent to defraud the United States of any tax thereon, shall be forfeited, an automobile so used by a person who did not own the car, because he had it on credit from an owner who retained the title, is subject to libel and forfeiture, although the owner was without notice of the forbidden use. The same principle was declared in *United States v. Stowell*, 133 U. S. 1, and in various other cases.

In *The Little Charles*, 1 Brock. 347, F. C. No. 15,612, Chief Justice Marshall held that a vessel was liable to forfeiture when she departs from a port of the United States in violation of the Embargo Act, and that this is true, irrespective of whether the violation was with or without the authority of the owner. See also *The Mineola-Machado v. U. S.*, 16 F. (2d) 844 (C. C. A. 1).

In *U. S. v. Hall*, 9 Am. Law Reg. 232, Fed. Cases No. 15,281, the principle was invoked to prevent private parties from carrying mail in competition with the Government.

See also *United States v. One Ford Coupe*, 272 U. S. 321, 326, where the same principle was invoked in connection with the prohibition law.

And in *The Pilot*, 43 F. (2d) 491, the Circuit Court of Appeals for the Fourth Circuit said (p. 493):

> "Innocence of the owner is not a defence to forfeiture *in rem* incurred under the customs and navigation laws. There is no disagreement among the courts on this proposition, and the law on this point has been definitely settled. *United States v. One Saxon Automobile, et al.* (C. C. A.), 257 F. 251; *United States v. Mency* (C. C. A.), 254 F. 287, 5 A. L. R. 211; *Logan v. United States* (C. C. A.), 260 F. 746; *United States v. One Black Horse* (D. C.), 129 F. 167; *The Esther M. Randle*, 7 F. (2d) 545; *The Mineola*, 16 F. (2d) 844; *Dobbins' Distillery v. United States*, 96 U. S. 395; *United States v. Stowell*, 133 U. S. 1; *Goldsmith, Jr.-Grant Co. v. United States*, 254 U. S. 505. See, also, *United States v. Brig Malek Adhel*, 2 How. 210; *Van Oster v. Kansas*, 272 U. S. 465" (p. 493 of 43 F. (2d)).

So also in *Van Oster v. Kansas*, 272 U. S. 465, this Court, speaking through Mr. Justice Stone, said (p. 467):

> "It is not unknown or indeed uncommon for the

law to visit upon the owner of property the unpleasant consequences of the unauthorized action of one to whom he has entrusted it. Much of the jurisdiction in admiralty * * * are familiar examples" (p. 467 of 272 U. S.).

See also *The Three Friends*, 166 U. S. 1, where this Court enforced the same doctrine to prevent fillibustering.

It is submitted that to sustain the proposition that *in rem* liability is dependent upon *in personam* liability of the owner of the *res*, would undermine not only the Maritime law, but would seriously affect those laws of the United States regulating air and maritime transportation, as well as revenue and embargo laws, laws against unlawful manufacture and trade, and laws prohibiting the dumping of refuse in harbors. As was well said by this Court in the case of *The Scow 6-S*, 250 U. S. 269, at p. 272, while dealing with the last mentioned class of case, without the process *in rem* the Government would be forced to resort to the "slow course of criminal proceedings against the persons individually responsible".

Conclusion.

In summary, we submit (1) that since the bills of lading were signed "For Master", they clearly bound the "Venice Maru" *in rem* and their admitted breach created maritime liens enforcible against the vessel irrespective of its ownership; (2) that under well-settled authority the *in rem* liability so created was wholly separate, distinct and independent of any *in personam* liability on the part of the vessel owner or charterer; (3) that the Fire Statute by its terms applies only to the liability of the vessel owner, *i. e.*, *in personam* liability; and (4) that the unusual exemption granted by the Fire Statute to the "owner" only should not by judicial construction be extended beyond the wording of the statute to divest mari-

time liens which constitute a *jus in re*; particularly since Congress, in the other sections of the Act of March 3, 1851, and in subsequent statutes, has taken care to specify with particularity the recipients of all statutory exemptions granted by it and did not elect to relieve a vessel from this liability, *i. e.*, its liability for fire, until 1936, when it passed the Carriage of Goods by Sea Act two years after the causes of action here involved arose, and then only in limited trades.

Wherefore, the decree below discharging the "Venice Maru" from liability should be modified so as to permit your petitioners to recover from the value of that vessel in respect of their claims for cargo damage, together with interest and costs.

Respectfully submitted,

D. ROGER ENGLAR,
T. CATESBY JONES,
EZRA G. BENEDICT FOX,
THOMAS H. MIDDLETON,
Proctors for Petitioners.

September 25, 1943.

Appendix A.

Act of March 3, 1851.

(9 Stat. 635.)

Chap. XLIII.—An Act to limit the Liability of Ship-Owners, and for other Purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no owner or owners of any ship or vessel shall be subject or liable to answer for or make good to any one or more person or persons any loss or damage which may happen to any goods or merchandise whatsoever, which shall be shipped, taken in, or put on board any such ship or vessel, by reason or by means of any fire happening to or on board the said ship or vessel, unless such fire is caused by the design or neglect of such owner or owners: Provided, That nothing in this act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of ship-owners.

[As carried over into the U. S. Code (Sec. 182 of Title 46), the foregoing section reads as follows:

> "Sec. 182: *Loss by fire.* No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."]

Sec. 2. And be it further enacted, That if any shipper or shippers of platina, gold, gold dust, silver, bullion, or other precious metals, coins, jewelry, bills of any bank or public body, diamonds or other precious stones, shall lade

the same on board of any ship or vessel, without, at the time of such lading, giving to the master, agent, owner or owners of the ship or vessel receiving the same, a note in writing of the true character and value thereof, and have the same entered on the bill of lading therefor, the master and owner or owners of the said vessel shall not be liable, as carriers thereof, in any form or manner. Nor shall any such master or owners be liable for any such valuable goods beyond the value and according to the character thereof so notified and entered.

[As carried over into the U. S. Code (Sec. 181 of Title 46), the foregoing section reads as follows:

"Sec. 181. *Liability of masters as carriers.* If any shipper of platina, gold, gold dust, silver, bullion, or other precious metals, coins, jewelry, bills of any bank or public body, diamonds, or other precious stones, or any gold or silver in a manufactured or unmanufactured state, watches, clocks, or timepieces of any description, trinkets, orders, notes, or securities for payment of money, stamps, maps, writings, title deeds, printings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with any other material, furs, or lace, or any of them, contained in any parcel, or package, or trunk, shall lade the same as freight or baggage, on any vessel, without at the time of such lading giving to the master, clerk, agent, or owner of such vessel receiving the same a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner; nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof so notified and entered."]

* * *

Sec. 5. And be it further enacted, That the charterer or charterers of any ship or vessel, in case he or they shall man, victual and navigate such vessel at his or their own expense, or by his or their own procurement, shall be deemed the owner or owners of such vessel within the meaning of this act; and such ship or vessel, when so chartered, shall be liable in the same manner as if navigated by the owner or owners thereof.

[As carried over into the U. S. Code (Sec. 186 of Title 46), the foregoing section reads as follows:

"Sec. 186. *Charterer may be deemed owner.* The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof."]

Sec. 6. And be it further enacted, That nothing in the preceding sections shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers, or mariners, for or on account of any embezzlement, injury, loss, or destruction of goods, wares, merchandise, or other property, put on board any ship or vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or mariners, respectively, nor shall any thing herein contained lessen or take away any responsibility to which any master or mariner of any ship or vessel may now by law be liable, notwithstanding such master or mariner may be an owner or part owner of the ship or vessel.

[As carried over into the U. S. Code (Sec. 187 of Title 46), the foregoing section reads as follows:

"Sec. 187. *Remedies reserved.* Nothing in the five

preceding sections shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers, or seamen, for or on account of any embezzlement, injury, loss, or destruction of merchandise, or property, put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel."]

Appendix B.

The Harter Act.

Act of Feb. 13, 1893; Chap. 105.

(27 Stat. 445.)

Sec. 1: That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

[The foregoing section was carried over verbatim into the U. S. Code as Sec. 190 of Title 46.]

Sec. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence to properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

[The foregoing section was carried over verbatim into the U. C. Code as Sec. 191 of Title 46.]

Sec. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

[The foregoing section was carried over verbatim into the U. S. Code as Sec. 192 of Title 46.]

* * *

Sec. 6. That this act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two, and forty-two hundred and eighty-three of the Revised Statutes of the United States, or any other statute defining the liability of vessels, their owners, or representatives.

[The foregoing section, as carried over into the U. S. Code (Sec. 196 of Title 46), reads as follows:

"Sec. 196. *Certain laws unaffected.* Sections 190-195 of this title shall not be held to modify or repeal sections 181, 182, and 183 of this title, or any other statute defining the liability of vessels, their owners, or representatives."]

Appendix C.

THE PHEBE.

Fed. Case No. 11,064.

(1 Ware (263) 265.)

District Court, D. Maine. March 13, July 12, 1834.

This was a suit founded on a bill of lading. The libel alleged that on the 24th of August, 1832, G. W. McLellan, the libellant, shipped on board the Phebe, of which Otis Roberts was master, 136 tons of gypsum, consigned to Jabez Ellis & Son, of Boston, of the value of $259.78, the master to have for his freight all the net proceeds of the sales over that sum, for which he signed three bills of lading; that the master, instead of carrying the gypsum to Boston, stopped at Castine, transhipped it on board another vessel, and has never delivered it to the consignees. Perkins, the owner, filed a claim and put in an answer to the libel, alleging that on the first day of August, 1832,

he let the vessel to Roberts, to be employed in the coasting trade, on a parol agreement, by which Roberts was to victual and man and have the entire control of the vessel, and that the owner was to have one half of her earnings for the hire of the vessel; that Roberts having taken the vessel on this agreement, to be employed solely by him and on his account, went with her to Eastport, and there purchased on his own account a quantity of gypsum, or plaster-of-paris, for which he paid in part and agreed to pay the balance to Ellis & Son; that after the plaster was laden, McLellan illegally compelled Roberts to give him a bill of lading of the plaster in question, as security for the payment of the balance due; that it was agreed between Roberts and McLellan that Roberts should sell the plaster, and from the proceeds of the sale, pay over the balance due to McLellan to Ellis & Son; that after the brig sailed, she became so leaky, by the dangers of the seas, that the master was obliged to put into Castine and there procure another vessel to carry the plaster to Boston; that Perkins, the owner, had no interest in the contract made by Roberts, and he prays that the vessel may be pronounced free from the lien, and delivered to him. The libellant, to prove his case, offered in evidence the bill of lading signed by Roberts, the master. The claimant, to prove the facts alleged in the answer, offered the depositions of the master and one of the crew. The master's deposition was objected to on the ground that he was interested in the result of the suit, and both were objected to on the ground that parol evidence was inadmissible to control the effect of the bill of lading.

C. S. Daveis, for libellant.
Mr. Longfellow, for claimant.

Ware, District Judge. The case has been argued on the allegations in the libel and answer, and on the admissibility of the evidence offered by the respondent. The general principle that the vessel is liable in specie to the

shippers, for the non-execution of a contract of affreightment by a bill of lading, has not been controverted; but it is contended that the circumstances of this case take it out of the general rule. In the present case, the vessel was not in the employment of the owner. When a vessel is let by charter-party, and the charterer victuals and mans, and has the entire control of the vessel, the general owner is not responsible for the acts of the master. The charterer is substituted in his place, and becomes owner pro hac vice. There was, in this case, no charter-party in writing; but the vessel was let by a parol agreement, under which the hirer was to have the entire control of her. The owner had no right to interfere in any way in the employment of the vessel, while the contract remained in force. The master, also, was not appointed by him, and cannot therefore be considered as his agent, nor can he be held directly responsible for his acts.

It has been contended in argument, by the counsel for the libellant, that though the owner has divested himself of all right of control with respect to the employment of the vessel, yet as he receives for the hire of the vessel, not a fixed and stipulated sum, but a certain proportion of the freight and earnings, be they more or less, he is directly interested in the freight, and ought to be held jointly liable with the hirer. The principle on which the owner is bound for the acts of the master is supposed to be borrowed by the maritime law directly from the exercitory action of the civil law. He is not liable in his character of owner or proprietor of the vessel, but as employer, for that is the meaning of the word "exercitor." In that character he is responsible for the acts of the master, first, because he is his agent and is appointed by him, and subject to his orders, and secondly, because he is entitled to the earnings of the vessel. The definition of exercitor is, the person who receives the earnings of the vessel. "Exercitorem autem eum dicimus ad quem obventiones et reditus omnes perveniunt." *Dig.* 14, 1, 1, 15. As the profits of the vessel were to be equally divided between the general

owner and the charterer, it is contended that they are liable as joint exercitors; that the form of the contract constituted them, in fact, partners in the business carried on by the vessel. The argument is certainly not without force, and would deserve to be maturely considered if the question could be considered as an open one in this country. But it is too firmly settled by judicial decisions to be now brought into controversy. The cases of *Reynolds* v. *Toppan*, 15 Mass. 370, *Taggard* v. *Loring*, 16 Mass. 336, *Thompson* v. *Snow*, 4 Greenl. 268, and *Emery* v. *Hersey*, 4 Greenl. 407, have fixed the legal construction of a contract like this. The general principle is that when, by a contract of charter-party, the charterer takes the vessel into his own possession and control, and navigates her by his own master and crew, he alone is responsible for the acts of the master; and these cases decide that it makes no difference, in this respect, although the owner may be so far interested in the voyage that he receives for the hire of his vessel a certain proportion of her earnings, instead of a fixed sum. Although this mode of determining the hire of the vessel gives to the contract the aspect of a partnership transaction, it is not admitted to draw after it the consequences of a partnership, but is considered merely as an equitable mode of ascertaining the charter, or the real value of the use of the vessel. And the rule of construction applied to contracts in this form is analogous to the other decisions of the maritime law, and the law merchant. It was formerly a common practice, and is now perfectly legal for seamen to engage, not for wages, at a fixed and stipulated price, but for a share of the freight and profits of the adventure. It is still customary in some branches of business, as in the fisheries, both in the cod and whale-fisheries, for seamen to engage on shares, by which they become directly interested in the profits of the voyage; but contracts of this kind have never been considered as constituting partnerships, in the proper sense of the word, and the incidents belonging to a contract of partnership have never been considered as

applicable to them. So a clerk may agree with a merchant to receive as a compensation for his services a certain portion of the profits of the business, instead of a fixed salary, without being involved in the liabilities of a partner; that is, he may stipulate for a contingent compensation, to be ascertained by some future event, and that event may be the issue or success of the business in which he is employed. 3 *Kent, Comm.* 33. The distinction is, whether he is interested in the profits, as profits, or whether recourse is to be had to them only to determine the measure of his compensation. The distinction savors, it is true, of refinement and subtlety, and its solidity and justice has been questioned by high authority (*Ex parte Hamper*, 17 Ves. 404), but it is too firmly established to be now brought into doubt. The principle is applied, in the cases cited, to the hire of a vessel upon the terms on which this was hired. If, then, this action had been brought against the owner in personam, it could not have been sustained.

Inasmuch as the owner cannot be held directly and personally responsible in this case, it is contended that he cannot be indirectly held, by subjecting his property to this responsibility. The argument is, that the liability of the vessel is merely collateral or accessory to that of the owner, and stands in the nature of a surety or pledge. This objection admits of two answers. In the first place, conceding it to be correct in principle that the liability of the vessel is only collateral and subsidiary to that of the personal responsibility of the owner, by the owner in this case is meant, not the proprietor but the employer. Roberts, the charterer, is for this purpose the owner; he is the exercitor, and it is to the quality of exercitor or employer that the liability is attached. Allowing, then, the liability of the vessel to be not primary but collateral, it is collateral to that of Roberts. But the argument is founded on a misconception of the true principles of the law. This rule, by which the vessel is bound in specie for the acts of the master, is not derived from the civil

law, but has its origin in the maritime usages of the middle ages; and it is to these usages that we must look to ascertain its true character. The civil law considered the master as the simple praepositus, or agent of the owner or exercitor, and authorized him to bind his principal in all matters relating to the business with which he was intrusted. Dig. 14, 1, 1, 7. The act of the master, while acting within the limits of his authority, bound the principal in the same manner as it would if it had been the act of the principal himself. If there were several exercitors, each was bound in solido, that is, to the full amount of the obligation contracted by the master, because he was the praepositus of each exercitor; and also in favor of the creditor, ne in plures adversarios distringatur qui cum uno contraxerit. Dig. 14, 1, 1, 25; Id. 14, 1, 2. The exercitor was equally bound for the acts of the master, whether the obligation was ex contractu or ex delicto, and whether resulting from the fraud or negligence of the master; not indeed by the exercitory action which relates exclusively to the contracts of the master, but by other appropriate actions of the law. Huber. Praelect, Jur. Civ. Lib. 14, 1, 8; Dig. 4, 9, 3, 1; Id. 4, 9, 4; Id. 44, 7, 5; Id. 47, 5, 1; Voet ad Pand. 14, 1, 7. But for the obligations of the master ex delicto, if there were several exercitors, each was bound only for his own proportion. Dig. 4, 9, 7, § 4 and 5. But by the maritime usages and customs of the middle ages, which, having been generally adopted by merchants, silently acquired the force of a general law, the master, who was ordinarily a part owner (see Consulat de la Mer, passim, particularly chapters 46-57, or chapters 1-11 of the edition of Pardessus. Jugemens d'Oleron, art. 1; Droit Maritime de Wisbuy, Pardessus Ed., art. 15; Collection des Lois Maritimes, p. 470, note 7), was not considered as properly the agent or mandatary of the other part owners, but rather as the administrator of the property, that is, of the vessel which was intrusted to his care and management. He was authorized to employ it for the common benefit

of all the owners, more in the character of the acting partner of a societé en commandité, or limited partnership, than in that of agent for his co-owners. As the gerant or active partner, he was authorized to act for the other owners, and bind them in all matters relating to the employment of the vessel, to the extent of their interest in it; or to speak more correctly, to bind the property itself which was confided to his administration; but his authority did not extend to a sale of the ship without the express consent of his co-owners, except in a case of necessity. Consulat de la Mer, c. 256. The ship and freight were pledged for the fulfilment of these obligations, and might be seized and sold to satisfy them. This is evident from many chapters of the Consulate of the Sea, the most complete and authentic record of these primitive usages and customs. Consulat de la Mer, cc. 58, 63, 72, 138, 186, 193, 227. Thus all the contracts of the master with the mariners for their wages, with materialmen, for repairs and supplies of rigging, or for provisions, or other necessaries for the vessel, involved a tacit hypothecation of the ship and freight. But he was not authorized, in his character as master, and as representing his co-owners, to bind them beyond the value of their share in the ship and freight. To do more than this, he must have a special power for that purpose. Consulat (Boucher's Trans.) c. 34. He was the agent or representative of the other owners, only so far as they had confided their capital to his administration. If the vessel was lost before the creditors were paid, they had no remedy except against the master. The other part owners were discharged from all responsibility. Let the lender, then, says the Consulate, take care how he lends, for the owners lose enough when they lose their shares. Chapter 239, or 194 of the edition of Pardessus. The master could not, therefore, in the proper sense of the word, bind the owners, personally, at all because they could always withdraw themselves from their personal responsibility by

abandoning the ship and freight. 2 Pard. Lois Mar. p. 235, note.

If there were some exceptions to the general rule, in cases where the other part owners were present, and unreasonably refused to contribute their proportion towards the necessary repairs and outfit of the ship, as in the case mentioned in the Consulate (chapters 239 and 245; and see note of Pardessus cited above), these are but exceptions standing on their own peculiar reasons, and applied only when the owner was present, and when it might be imputed to them as a fault that they unreasonably refused to contribute to the necessary expenses of the ship. But in a foreign port, or where the owners were not present, and the master was acting under the general authority which the law or custom gave him as master, he could only bind the ship and freight. It was for this reason that Emerigon, whose mind was deeply imbued with the maritime traditions of the middle ages, says that the liability of the owners to answer for the acts of the master is rather real than personal. The legal power of the captain, says he, does not extend beyond the limits of the vessel of which he is master, that is, administrator. He cannot bind the other property of the owners, unless he have a special power for that purpose. Contrats a la Grosse, c. 4, § 11. There was the same limitation of the responsibility of the owners, whether the demand of the creditor was founded on the contract or tort of the master, or whether the damage for which he sought réparation resulted from the fault of the master, or the defects or insufficiency of the vessel, or her tackle or apparel. Consulat de la Mer, c. 227 and 63-72. Whenever a merchant formed any engagement with the master, he could look for his security only to the master himself, and to the capital of the owner, the administration of which was confided to him, that is, the ship and the freight. Thus we find, when the principle is traced back to its source, that it is by no means correct to say that the liability of the vessel is merely collateral or

accessory to that of the owner. On the contrary, in the origin of the custom the primary liability was upon the vessel, and that of the owner was not personal but merely incidental to his ownership, from which he was discharged either by the loss of the vessel or by abandoning it to the creditor. But while the law limited the creditor to this part of the owner's property, it gave him a lien or privilege against it in preference to his other creditors. This limitation of the responsibility of owners, though generally if not universally received by the maritime states of continental Europe, at least so far as relates to obligations arising from the faults of the master, has never been adopted in England or in this country, as a mercantile usage or customary law. Several acts of parliament have limited the responsibility of owners for the tortious acts of the master, to the value of the ship and freight, but the common, like the civil law, holds the owner responsible without limitation. Abb. Shipp. pt. 3, c. 5. And what is alone material in this case, the principle that the ship and freight are bound for the acts of the master, has been incorporated into the maritime jurisprudence of England, though from the limited jurisdiction of the admiralty, the shipper cannot have the full benefit of it. Abb. Shipp. p. 93. In this country the lien is not only acknowledged, but is enforced by our courts of admiralty. And having been borrowed from the general maritime law, or the customs and usages of the sea, we must look to them, rather than to our peculiar maritime jurisprudence, for its true character and the cases to which it applies. By that law, the master's authority to bind the vessel is the same, whether he is appointed by the owners, or the ship is let to him by a charter-party. The Consulate of the Sea (chapter 289) presents a case of the letting of a ship by a contract identical in all its conditions with this, (the contracts of commenda or commande,) to be employed by the hirer for a share of the profits, and the ship is declared to be liable in the hands of the hirer, and he to be answerable to the owners.

Whoever deals with the master, in all cases where he is acting within the scope of his authority as master, is entitled to look to the ship as his security. There is, therefore, no foundation in law for the distinction insisted upon by the respondent's counsel. Nor has it any more foundation in reason or mercantile policy. If this privilege is given as an additional security to the merchant, the reason for it is quite as strong, to say the least, when the ship is employed under a charter-party, as when it is in the employment of the owner. The owner has his remedy against the charterer.

The other question is, whether the respondent can, in this case, be admitted to contradict, by parol evidence, the bill of lading executed by the master. The question is not whether the master can himself contradict it, or the employers of the vessel by whom he is appointed and for whose acts they are responsible. The proprietor in this case intervenes as a third person, who has no interest in the contract between the master and shipper. The rule of law that parol evidence shall not be admitted to control or contradict a contract reduced to writing, applies between those who are parties to it and those who represent them or derive their rights from them. It does not apply against third persons, whose rights may be incidentally affected by the contract. Admitting, then, that the bill of lading is conclusive against the master, which is undoubtedly true as a general rule, it does not follow that it is so against the respondent, who is a stranger to the contract. It would open a wide door for fraud if third persons could in this way be precluded from proving the truth. The bill of lading, says Valin, is conclusive against the assured, and nothing can be admitted against its tenor. 2 Valin, Comm. p. 139. He is a party to it. But it is not conclusive on the insurers. They may disprove it by every species of legal evidence. Emer. Ins. c. 11, §3; 2 Valin, Comm. p. 144. Nor is the bill of lading conclusive against other shippers, in cases of jettison and contribution. Valin, Sur Ordonnance de la

Marine, liv. 2, tit. 3, art. 7; Id., liv. 3, tit. 8, art. 9. "The nautical laws of all times, have," says Boulay Paty, "given to the bill of lading the character of proof; it is received not only between the master and merchant shipper, but also against the insurers and all other persons, saving the right to prove fraud or collusion. It is beyond doubt, that third persons, who are not parties to the bill of lading, have a right to contradict and prove its incorrectness by every species of proof." 2 Cours de Droit Mar. p. 306. The proprietor, who in this case is a stranger to the contract, may, on the principles both of the common and maritime law, be admitted to explain and contradict it by every species of legal evidence.

After the foregoing opinion was delivered, the cause was continued on the motion of the libellant, to enable him to introduce further evidence in support of the libel. The principal evidence was the testimony of Mr. Buckman, who at the time of the transaction was a clerk in the store of the libellant. He stated that Roberts, in the first place, purchased 220½ tons of plaster, of McLellan, on account of the owners; that the original intention of Roberts was to carry the plaster to New York, but that after the brig was loaded, it was found that she leaked so badly that it was necessary to take out part of the cargo, namely, about eighty tons; that the sale was then rescinded, and the destination of the vessel changed to Boston; and that it was agreed that the master should carry the plaster which remained on board, on freight, and receive for the freight all the proceeds of the sale over $259.78, which was the price he had agreed to pay for it.

The respondent offered the depositions of Roberts, the master, and Gray, one of the hands. Gray stated that when Roberts arrived at Eastport he went to McLellan, and asked him to put on board a cargo, on freight; that McLellan declined, on account of the low price of plaster, and that Roberts afterwards purchased of him a cargo of plaster, intending to carry it to New York, but on account

of the leaky state of the vessel part of it was relanded by the order of McLellan. Roberts, in his deposition, says that he purchased the plaster of McLellan, and that, after the vessel was loaded, McLellan required him to sign bills of lading of the plaster as being shipped by him, as security for the sum due for the purchase, and for cash advanced; and that after the bills were signed, McLellan agreed that instead of delivering the plaster to Ellis & Son, he might sell it, and pay over to them the sum due, that is $259.78, and that he, not being much acquainted with bills of lading, thought that he might properly enough sign the bills, as he was requested.

WARE, District Judge. It has been suggested at the argument that after the Phebe put into Castine, and the cargo was transhipped into another vessel, it was actually carried to the port of destination, although it is not pretended that it was delivered to the consignees, or the proceeds of the sale deposited with them. But it is argued that the Phebe having been disabled by the dangers of the seas from pursuing the voyage, and the goods having been transhipped to be conveyed in another vessel, she is discharged from the lien, and that, if any exists, it attaches to the vessel to which they were transferred. The argument proceeds on the assumption that the Phebe was prevented from performing the voyage and delivering the cargo, according to the terms of the bill of lading, by the dangers of the seas. But the fact, according to the evidence, was otherwise. It appears that she was in a leaky condition when the plaster was taken on board, and without meeting with any bad weather, or any accident, she was obliged to put into port because she was, in fact, unseaworthy and unfit for the voyage. The goods were laden on board the Phebe, and she became bound for the performance of the contract, supposing it to be a contract of affreightment, unless she was prevented by some of the perils excepted in the bill of lading. Whether the other

vessel into which they were transhipped, might not also be liable, is a question which does not arise in this case.

But the principal question which arises on the new evidence is, whether there was in this case a bona fide contract of affreightment, or whether it was a contract for a sale of the goods, disguised under the form of an affreightment. I agree with the respondent's counsel, that if this bill of lading was used merely as a disguise to cover a sale, or if it were an arrangement resorted to as a security for the payment of the purchase-money, it could create no lien on the vessel; and if such were the contract, it is immaterial whether the purchase was made by the master on his own account, or on the account of his owners. In neither case would the vender be entitled to a lien on the vessel for his security. It is only those contracts which the master makes in his quality as master, that specifically bind the ship, and affect it by way of a lien or privilege in favor of the creditor. But is there any evidence that this was not a bona fide contract of affreightment? It is proved by a bill of lading in the usual form. Though this is not binding and conclusive with respect to third persons, it is, with respect to them, evidence of a high character. It may be impeached; but it is not lightly to be presumed that parties, who put their contracts into writing with all the usual forms and solemnites which belong to it, intend a different contract from that which the written agreement plainly expresses. It belongs to him who impeaches it to show by satisfactory evidence that it is a simulated contract.

The first circumstance relied on for this purpose appears on the face of the paper. The master was to receive for his freight, not a fixed and certain sum, but all that the plaster should sell for over a certain sum. This is an unusual mode of settling the amount of freight, but there is nothing illegal in such an agreement. The master could lose nothing but the run of the vessel, for he would be discharged by delivering the cargo to the consignees,

and for his compensation he might be willing to take the risk of the market. Another circumstance relied upon is, that at the time when the bill of lading was executed, a bill of parcels was delivered by McLellan to the master, in which 220 tons of plaster was charged to the brig, with some other small charges, and credit was given for the plaster returned, and the account was balanced by this sum of $259.78, to be paid to Ellis & Son, as per bill of lading. It is argued that this paper shows clearly that there was a sale of the plaster, and that the bill of lading was only given as a security for the payment. But this paper is not a contract nor legal evidence per se of a contract. It is but a memorandum of one of the parties, and is satisfactorily explained by the parol evidence. It is proved that in the first instance there was a sale of the plaster, and when it was found, from the leaky condition of the vessel, that she was unfit for the intended voyage to New York, eighty tons of the plaster was relanded, and the voyage changed from New York to Boston. Buckman, the clerk of the libellant, says that the contract was rescinded and a new agreement made, by which the master was to take the plaster on freight. Roberts say that although the plaster was consigned to Ellis & Son, he was authorized to sell it and pay over the amount named in the bill of lading, instead of delivering the plaster to Ellis & Son. Now as Roberts was to have for freight all that the plaster should sell for over a certain sum, and that if it sold for no more he would have nothing, it was but reasonable that he should have the power of trying the market, and getting the best price that could be obtained. The memorandum given to Roberts may be considered as giving him an implied authority to sell the plaster and pay over the balance of the amount, instead of delivering it to the consignees. The only evidence opposed to this view of the transaction is that of Roberts himself. He says that the bill of lading was given merely as a security for the payment of the purchase-money. Now, waiving

all objection to the admissibility of his testimony, as a witness to impeach an instrument to which he is a party, his testimony alone and unsupported, for Gray, the other witness, left the vessel before she sailed, is insufficient to overbalance the credit due to the bill of lading, sustained as it is by the direct testimony of Buckman.

[Note. The vessel was sold on the issuing of a venditioni exponas, and the counsel for libelant subsequently moved for a rule on the marshal to pay into court the residue of the money for which the brig was sold. The motion was granted. Case No. 11,065. A motion was thereupon made, by the counsel for the actor, for a monition to Perkins, the purchaser, to show cause why he should not pay to the marshal the balance of the purchase money, which is unpaid. The motion was granted. Id. 11,066.]